

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 301 Calendar**

Wednesday, September 8, 2021

Hearing Room 301

11:00 AM

6:18-14155 Alfredo Andrade and Daniela Andrade

Chapter 7

#1.00 Motion to Disallow Claim No. 12 filed by Real Time Resolutions, Inc., with proof of service
(Motion filed 7/27/21)

Also #2

EH__

[Tele. appr. Michelle Marchisotto rep. chapter 7 trustee]

Docket 44

Tentative Ruling:

9/8/21

BACKGROUND:

On May 17, 2018, Alfredo & Daniela Andrade ("Debtors") filed a Chapter 7 voluntary petition. On August 27, 2018, Debtors received their discharge.

On February 26, 2019, Real Time Resolutions, Inc. ("Creditor") filed a proof of claim for an unsecured claim in the amount of \$14,807.93 ("Claim 12"). The claim is based on a deficiency balance relating to a home equity credit line agreement

On July 27, 2021, Trustee filed an objection to Claim 12 asserting that the claim is statutorily barred.

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APPLICABLE LAW:

Pursuant to 11 U.S.C. § 502(a), a proof of claim is deemed allowed unless a party in interest objects. Absent an objection, a proof of claim constitutes *prima facie* evidence of the validity and amount of the claim under Federal Rule of Bankruptcy Procedure ("FRBP") 3001(f). *See Lundell v. Anchor Constr. Specialists, Inc.*, 223 F.3d 1035, 1039 (9th Cir. 2000). When a party files an objection to a proof of claim, that filing "creates a dispute which is a contested matter" within the meaning of FRBP 9014 and the Court must resolve the matter after notice and opportunity for hearing upon a motion for relief. *Id.*

When a creditor has filed a proof of claim that complies with the rules (thereby giving rise to the presumption of validity), the burden shifts to the objecting party who must "present evidence to overcome the *prima facie* case." *In re Medina*, 205 B.R. 216, 222 (9th Cir. B.A.P. 1996). To defeat the claim, the objecting party must provide sufficient evidence and "show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves." *Lundell*, 223 F.3d at 1039 (*quoting In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991)). "The objector must produce evidence, which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency." *Lundell*, 223 F.3d at 1040 (*quoting In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173-74 (3d Cir. 1992)). If the objecting party produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts back to the claimant to prove the validity of the claim by a preponderance of the evidence. *See In re Consol. Pioneer Mort*, 178 B.R. 222, 226 (9th Cir. BAP 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996) (*quoting Allegheny Int'l*, 954 F.2d at 173-74). The ultimate burden of persuasion remains at all times on the claimant. *See Lundell*, 223 F.3d at 1039; *see also Holm*, 931 F.2d at 623.

As is required by LBR 3007-1, "an objection to claim must be supported by

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admissible evidence sufficient to overcome the evidentiary effect of a properly documented proof of claim executed and filed in accordance with FRBP 3001. The evidence must demonstrate that the proof of claim should be disallowed, reduced, subordinated, re-classified, or otherwise modified."

ANALYSIS:

11 U.S.C. § 502(b)(1) (2005) states:

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

CAL. CODE CIV. P. § 337 (2016) provides a statute of limitations of four years for debts founded on written contracts, book accounts, accounts stated based upon account in writing, "balance of mutual, open and current account in writing," and rescission of written contract. Once the statute of limitations has passed, the claim is unenforceable. *See e.g., Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938).

Claim 12 states that it is based upon money loan and attaches the relevant loan documentation. Therefore, it appears that Claim 12 fits within the category established by CAL. CODE CIV. P. § 337, and that the statute of limitations is four years. Trustee asserts that the senior lienholder foreclosed on the subject real property in June 2010

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and that no made payments were made while Real Time Resolutions serviced the account, which, based on documentation attached to the proof of claim, appears to have begun during February 2013. Therefore, it does not appear that any activity regarding Claim 12 took place within the four years preceding the petition date.

Furthermore, the Court deems Creditor's failure to oppose the instant motion to be consent to the relief requested pursuant to Local Rule 9013-1(h).

TENTATIVE RULING

For the reasons set forth above, the Court is inclined to SUSTAIN the objection to Claim 12 and DISALLOW the claim

APPEARANCES WAIVED. Movant to lodge order within 7 days. If oral or written opposition is presented at the hearing, the hearing may be continued.

Party Information

Debtor(s):

Alfredo Andrade

Represented By
Paul Y Lee

Joint Debtor(s):

Daniela Andrade

Represented By
Paul Y Lee

Movant(s):

John P Pringle (TR)

Represented By
Michelle A Marchisotto

Trustee(s):

John P Pringle (TR)

Represented By
Michelle A Marchisotto

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#2.00 Motion to Disallow Claim No. 13 filed by LVNV Funding, LLC, with proof of service
(Motion filed 7/27/21)

EH__

Docket 46

***** VACATED *** REASON: NOTICE OF WITHDRAWAL FILED
8/20/21**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Alfredo Andrade

Represented By
Paul Y Lee

Joint Debtor(s):

Daniela Andrade

Represented By
Paul Y Lee

Movant(s):

John P Pringle (TR)

Represented By
Michelle A Marchisotto

Trustee(s):

John P Pringle (TR)

Represented By
Michelle A Marchisotto

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6:20-15400 Fasttrak Foods, LLC

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#3.00 Motion to Approve Compromise Under Rule 9019 - Chapter 7 Trustee's Motion to Approve Compromise of Controversy with Pegasus Peak LLC; Memorandum of Points and Authorities and Declaration in Support Thereof (Motion filed 8/16/21)

Also #4, 5

EH__

Docket 141

Tentative Ruling:

9/8/2021

BACKGROUND

On August 7, 2020, Fasttrak Foods, LLC ("Debtor") filed a Chapter 11 Subchapter V voluntary petition. On October 7, 2020, Pegasus Peak LLC ("Pegasus") obtained relief from the automatic stay under 11 U.S.C. § 362(d)(2) regarding Debtor's principal place of business, 45585 Commerce St., Indio, CA 92201 (the "Business Premises"). On June 11, 2021, Debtor's case was converted to Chapter 7 upon motion by the Debtor.

On August 4, 2021, Trustee employed counsel. On August 16, 2021, Trustee filed a motion to approve compromise. On August 18, 2021, Trustee filed an application to employ auctioneers and a motion to sell property of the estate. The Court has not received opposition to any of these requests.

Pursuant to the compromise motion with Pegasus, Trustee receives authorization to remove and sell Debtor's personal property located at the Business Premises. Trustee also receives from Pegasus waiver of its post-petition rent claim from the commencement of the case through October 15, 2021. The only material consideration given by the bankruptcy estate appears to be granting Pegasus \$750 in daily rent if the

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Business Premises are not vacated by October 15, 2021.

Pursuant to the application to employ auctioneers and the sale motion, Debtor proposes to auction certain personal property, manufacturing equipment that was used in Debtor's business (the "Property"). Debtor valued the Property in the schedules at \$12,500; Trustee asserts that the Property has an auction value of between \$60,000 and \$100,000. The application to employ auctioneer provides for a 25% commission and reimbursement of expenses up to \$20,000. The application provides, however, for a guaranteed recovery of \$60,000 for the bankruptcy estate. The proposed auction is to occur at the Business Premises and online on September 29, 2021. Trustee requests that the sale be approved free and clear of three liens that it contends are in bona fide dispute.

DISCUSSION

I. Compromise Motion

FED. R. BANKR. P. Rule 9019 provides that:

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

The Ninth Circuit Court of Appeals have previously outlined the factors to be considered in approving a compromise pursuant to Rule 9019: (1) the probability of success in the litigation; (2) the difficulties to be encountered in the matter of collection; (3) the complexity, expense, inconvenience and delay of litigation; and (4) the interest of creditors with deference to their reasonable expectations. *See In re A&C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986). The listed factors assist the Court in determining "the fairness, reasonableness and adequacy of a proposed settlement agreement." *Id.*

Here, for the reasons stated in the compromise motion, the Court concludes that the

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A&C Properties factors are clearly satisfied here given that Pegasus is waiving a potentially significant administrative claim and the only consideration flowing from the bankruptcy estate is conditional in nature and only specifies the amount of the administrative claim that Pegasus would be entitled to if Debtor does not vacate the premises by October 15. While the compromise motion does not provide any evidence regarding the daily rent for the Business Premises, Pegasus's proof of claim for Claim 37 suggests that the \$750 in daily rent is not materially different from the contractual daily rental rate. For this reason, and for the reasons stated in the motion, the Court is inclined to grant the compromise motion.

II. Application to Employ Auctioneer

11 U.S.C. § 327(a) states:

- (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 328(a) states, in pertinent part:

- (a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis.

The Court is satisfied that the evidence submitted in support of the application contains sufficient detail to establish the disinterestedness of the proposed auctioneers. The Court does note, however, that the application is lacking in evidence or information that would enable the Court to assess the reasonableness of the compensation arrangement. The Court notes that from its review of the application it appears to be anticipated that the auctioneer will not receive its full 25% commission due to the guaranteed threshold recovery, and that the auctioneer's expenses may also

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be reduced due to the cap on expenses.

III. The Sale Motion

11 U.S.C. § 363(b)(1) allows a trustee to sell property of the estate outside of the ordinary course, after notice and a hearing. A sale pursuant to § 363(b) requires a demonstration that the sale has a valid business justification. *In re 240 North Brand Partners, Ltd.*, 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996). "In approving any sale outside the ordinary course of business, the court must not only articulate a sufficient business reason for the sale, it must further find it is in the best interest of the estate, i.e. it is fair and reasonable, that it has been given adequate marketing, that it has been negotiated and proposed in good faith, that the purchaser is proceeding in good faith, and that it is an "arms-length" transaction." *In re Wilde Horse Enters., Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal.).

While the motion does not contain any detailed evidence of the advertising of the Property, the Court notes that the scheduled value of the Property and Trustee's assertion that a different auctioneer believed that the Property would sell for less than \$60,000, indicate that the auctioneer here is primarily shouldering the risk involved because the proceeds received by the bankruptcy estate are a fixed \$60,000 if the aggregate auction sale price is between \$60,000 and \$107,000.

Trustee requests that the sale be approved free and clear of liens. 11 U.S.C. § 363(f) (2010) states:

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if-

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be

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sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Trustee identifies three potential lienholders with liens affecting the Property: (1) Weaver Popcorn Bulk, LLC ("Weaver"); (2) Claudia Armenta Santoya ("Santoya"); and (3) the EDD (eight different liens). Trustee relies upon 11 U.S.C. § 362(f)(4), arguing that all of the liens are in bona fide dispute.

Regarding the Weaver lien, Trustee asserts that "[t]he collateral description appears to include food products and not Equipment." Based upon the Court's review of the UCC financing statement submitted in support of the sale motion, it does appear Trustee is not proposing to sell any property that Weaver holds a lien against. Therefore, to the extent Weaver contends it holds a lien against the Property, the Court finds that such lien is in bona fide dispute pursuant to 11 U.S.C. § 362(f)(4).

Regarding the Santoya lien, Trustee asserts that the lien was released on August 18, 2020. Based upon the Court's review of the Judgment Lien Change Form submitted in support of the sale motion, it does appear that Santoya's lien has been released. Therefore, to the extent Santoya contends it holds a lien against the Property, the Court finds that such lien is in bona fide dispute pursuant to 11 U.S.C. § 362(f)(4).

Regarding the EDD liens, Trustee argues that each lien: (i) has been released; (ii) is avoidable under § 547; or (iii) is void under § 549. The recording of a post-petition tax lien is a violation of the automatic stay. *See, e.g., In re Pinkstaff*, 974 F.2d 113 (9th Cir. 1992). Liens recorded in violation of the automatic stay are void. *See, e.g., In re Schwartz*, 954 F.2d 569 (9th Cir. 1992). Therefore, the Court concludes that the five EDD liens recorded postpetition are in bona fide dispute under 11 U.S.C. § 362(f)(4). The Court also notes the EDD lien containing filing number 20197741846582 was released on February 19, 2020, due to the filing of a release of lien. Therefore, to the extent EDD contends this remains a lien against the Property, the Court finds that such lien is in bona fide dispute pursuant to 11 U.S.C. § 362(f)(4).

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Regarding the EDD lien recorded during the 90-day preference period, Trustee contends that the lien is avoidable under § 11 U.S.C. § 547. Statutory liens are not avoidable under § 547. *See* 5 COLLIER'S ON BANKRUPTCY ¶ 547.08[6] (16th ed. 2017) ("Section 545 is the exclusive section for avoiding statutory liens."). Nevertheless, may be able to avoid the lien under 11 U.S.C. § 545. *See, e.g., In re Mainline Equip., Inc.*, 539 B.R. 165 (B.A.P. 9th Cir. 2015). Therefore, the Court finds this lien is in bona fide dispute pursuant to 11 U.S.C. § 362(f)(4).

Trustee has also requested waiver of the fourteen-day stay. FED. R. BANKR. P. Rule 6004(h) states: "An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." The Court deems the absence of objections to be consent to the relief requested, pursuant to Local Rule 9013-(1)(h), and, therefore, will waive the stay of Rule 6004(h).

TENTATIVE RULING

The Court is inclined to GRANT the compromise and sale motions in their entirety and APPROVE the application to employ auctioneer.

APPEARANCES REQUIRED.

Party Information

Debtor(s):

Fasttrak Foods, LLC

Pro Se

Movant(s):

Todd A. Frealy (TR)

Represented By
Carmela Pagay
Anthony A Friedman

Trustee(s):

Todd A. Frealy (TR)

Represented By
Carmela Pagay

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Fasttrak Foods, LLC

Anthony A Friedman

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#4.00 Application to Employ Onyx Asset Advisors, LLC and Rabin Worldwide, Inc. as Auctioneers

Also #3, 5
EH__

Docket 144

Tentative Ruling:

9/8/2021

BACKGROUND

On August 7, 2020, Fasttrak Foods, LLC ("Debtor") filed a Chapter 11 Subchapter V voluntary petition. On October 7, 2020, Pegasus Peak LLC ("Pegasus") obtained relief from the automatic stay under 11 U.S.C. § 362(d)(2) regarding Debtor's principal place of business, 45585 Commerce St., Indio, CA 92201 (the "Business Premises"). On June 11, 2021, Debtor's case was converted to Chapter 7 upon motion by the Debtor.

On August 4, 2021, Trustee employed counsel. On August 16, 2021, Trustee filed a motion to approve compromise. On August 18, 2021, Trustee filed an application to employ auctioneers and a motion to sell property of the estate. The Court has not received opposition to any of these requests.

Pursuant to the compromise motion with Pegasus, Trustee receives authorization to remove and sell Debtor's personal property located at the Business Premises. Trustee also receives from Pegasus waiver of its post-petition rent claim from the commencement of the case through October 15, 2021. The only material consideration given by the bankruptcy estate appears to be granting Pegasus \$750 in daily rent if the Business Premises are not vacated by October 15, 2021.

Pursuant to the application to employ auctioneers and the sale motion, Debtor

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DISCUSSION

I. Compromise Motion

FED. R. BANKR. P. Rule 9019 provides that:

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

The Ninth Circuit Court of Appeals have previously outlined the factors to be considered in approving a compromise pursuant to Rule 9019: (1) the probability of success in the litigation; (2) the difficulties to be encountered in the matter of collection; (3) the complexity, expense, inconvenience and delay of litigation; and (4) the interest of creditors with deference to their reasonable expectations. *See In re A&C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986). The listed factors assist the Court in determining "the fairness, reasonableness and adequacy of a proposed settlement agreement." *Id.*

Here, for the reasons stated in the compromise motion, the Court concludes that the *A&C Properties* factors are clearly satisfied here given that Pegasus is waiving a potentially significant administrative claim and the only consideration flowing from the bankruptcy estate is conditional in nature and only specifies the amount of the

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II. Application to Employ Auctioneer

11 U.S.C. § 327(a) states:

- (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 328(a) states, in pertinent part:

- (a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis.

The Court is satisfied that the evidence submitted in support of the application contains sufficient detail to establish the disinterestedness of the proposed auctioneers. The Court does note, however, that the application is lacking in evidence or information that would enable the Court to assess the reasonableness of the compensation arrangement. The Court notes that from its review of the application it appears to be anticipated that the auctioneer will not receive its full 25% commission due to the guaranteed threshold recovery, and that the auctioneer's expenses may also be reduced due to the cap on expenses.

III. The Sale Motion

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While the motion does not contain any detailed evidence of the advertising of the Property, the Court notes that the scheduled value of the Property and Trustee's assertion that a different auctioneer believed that the Property would sell for less than \$60,000, indicate that the auctioneer here is primarily shouldering the risk involved because the proceeds received by the bankruptcy estate are a fixed \$60,000 if the aggregate auction sale price is between \$60,000 and \$107,000.

Trustee requests that the sale be approved free and clear of liens. 11 U.S.C. § 363(f) (2010) states:

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if-

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

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(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Trustee identifies three potential lienholders with liens affecting the Property: (1) Weaver Popcorn Bulk, LLC ("Weaver"); (2) Claudia Armenta Santoya ("Santoya"); and (3) the EDD (eight different liens). Trustee relies upon 11 U.S.C. § 362(f)(4), arguing that all of the liens are in bona fide dispute.

Regarding the Weaver lien, Trustee asserts that "[t]he collateral description appears to include food products and not Equipment." Based upon the Court's review of the UCC financing statement submitted in support of the sale motion, it does appear Trustee is not proposing to sell any property that Weaver holds a lien against. Therefore, to the extent Weaver contends it holds a lien against the Property, the Court finds that such lien is in bona fide dispute pursuant to 11 U.S.C. § 362(f)(4).

Regarding the Santoya lien, Trustee asserts that the lien was released on August 18, 2020. Based upon the Court's review of the Judgment Lien Change Form submitted in support of the sale motion, it does appear that Santoya's lien has been released. Therefore, to the extent Santoya contends it holds a lien against the Property, the Court finds that such lien is in bona fide dispute pursuant to 11 U.S.C. § 362(f)(4).

Regarding the EDD liens, Trustee argues that each lien: (i) has been released; (ii) is avoidable under § 547; or (iii) is void under § 549. The recording of a post-petition tax lien is a violation of the automatic stay. *See, e.g., In re Pinkstaff*, 974 F.2d 113 (9th Cir. 1992). Liens recorded in violation of the automatic stay are void. *See, e.g., In re Schwartz*, 954 F.2d 569 (9th Cir. 1992) Therefore, the Court concludes that the five EDD liens recorded postpetition are in bona fide dispute under 11 U.S.C. § 362(f)(4). The Court also notes the EDD lien containing filing number 20197741846582 was released on February 19, 2020, due to the filing of a release of lien. Therefore, to the extent EDD contends this remains a lien against the Property, the Court finds that such lien is in bona fide dispute pursuant to 11 U.S.C. § 362(f)(4).

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Regarding the EDD lien recorded during the 90-day preference period, Trustee contends that the lien is avoidable under § 11 U.S.C. § 547. Statutory liens are not avoidable under § 547. *See* 5 COLLIER'S ON BANKRUPTCY ¶ 547.08[6] (16th ed. 2017) ("Section 545 is the exclusive section for avoiding statutory liens."). Nevertheless, may be able to avoid the lien under 11 U.S.C. § 545. *See, e.g., In re Mainline Equip., Inc.*, 539 B.R. 165 (B.A.P. 9th Cir. 2015). Therefore, the Court finds this lien is in bona fide dispute pursuant to 11 U.S.C. § 362(f)(4).

Trustee has also requested waiver of the fourteen-day stay. FED. R. BANKR. P. Rule 6004(h) states: "An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." The Court deems the absence of objections to be consent to the relief requested, pursuant to Local Rule 9013-(1)(h), and, therefore, will waive the stay of Rule 6004(h).

TENTATIVE RULING

The Court is inclined to GRANT the compromise and sale motions in their entirety and APPROVE the application to employ auctioneer.

APPEARANCES REQUIRED.

Party Information

Debtor(s):

Fasttrak Foods, LLC

Pro Se

Movant(s):

Todd A. Frealy (TR)

Represented By
Carmela Pagay
Anthony A Friedman

Trustee(s):

Todd A. Frealy (TR)

Represented By
Carmela Pagay
Anthony A Friedman

**United States Bankruptcy Court
Central District of California
Riverside
Judge Mark Houle, Presiding
Courtroom 301 Calendar**

Wednesday, September 8, 2021

Hearing Room 301

11:00 AM

6:20-15400 Fasttrak Foods, LLC

Chapter 7

#5.00 Motion to Sell Property of the Estate Free and Clear of Liens under Section 363(f) / Chapter 7 Trustee's Motion For Order Authorizing Sale Of Personal Property Of The Estate Free And Clear Of Liens Pursuant To 11 U.S.C. Section 363(B) And 363(F)

Also #3, 4

EH__

[Tele. appr. Crystle Lindsey, rep. Debtor]

Docket 146

Tentative Ruling:

9/8/2021

BACKGROUND

On August 7, 2020, Fasttrak Foods, LLC ("Debtor") filed a Chapter 11 Subchapter V voluntary petition. On October 7, 2020, Pegasus Peak LLC ("Pegasus") obtained relief from the automatic stay under 11 U.S.C. § 362(d)(2) regarding Debtor's principal place of business, 45585 Commerce St., Indio, CA 92201 (the "Business Premises"). On June 11, 2021, Debtor's case was converted to Chapter 7 upon motion by the Debtor.

On August 4, 2021, Trustee employed counsel. On August 16, 2021, Trustee filed a motion to approve compromise. On August 18, 2021, Trustee filed an application to employ auctioneers and a motion to sell property of the estate. The Court has not received opposition to any of these requests.

Pursuant to the compromise motion with Pegasus, Trustee receives authorization to remove and sell Debtor's personal property located at the Business Premises. Trustee also receives from Pegasus waiver of its post-petition rent claim from the

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commencement of the case through October 15, 2021. The only material consideration given by the bankruptcy estate appears to be granting Pegasus \$750 in daily rent if the Business Premises are not vacated by October 15, 2021.

Pursuant to the application to employ auctioneers and the sale motion, Debtor proposes to auction certain personal property, manufacturing equipment that was used in Debtor's business (the "Property"). Debtor valued the Property in the schedules at \$12,500; Trustee asserts that the Property has an auction value of between \$60,000 and \$100,000. The application to employ auctioneer provides for a 25% commission and reimbursement of expenses up to \$20,000. The application provides, however, for a guaranteed recovery of \$60,000 for the bankruptcy estate. The proposed auction is to occur at the Business Premises and online on September 29, 2021. Trustee requests that the sale be approved free and clear of three liens that it contends are in bona fide dispute.

DISCUSSION

I. Compromise Motion

FED. R. BANKR. P. Rule 9019 provides that:

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

The Ninth Circuit Court of Appeals have previously outlined the factors to be considered in approving a compromise pursuant to Rule 9019: (1) the probability of success in the litigation; (2) the difficulties to be encountered in the matter of collection; (3) the complexity, expense, inconvenience and delay of litigation; and (4) the interest of creditors with deference to their reasonable expectations. *See In re A&C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986). The listed factors assist the Court in determining "the fairness, reasonableness and adequacy of a proposed settlement agreement." *Id.*

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Here, for the reasons stated in the compromise motion, the Court concludes that the *A&C Properties* factors are clearly satisfied here given that Pegasus is waiving a potentially significant administrative claim and the only consideration flowing from the bankruptcy estate is conditional in nature and only specifies the amount of the administrative claim that Pegasus would be entitled to if Debtor does not vacate the premises by October 15. While the compromise motion does not provide any evidence regarding the daily rent for the Business Premises, Pegasus's proof of claim for Claim 37 suggests that the \$750 in daily rent is not materially different from the contractual daily rental rate. For this reason, and for the reasons stated in the motion, the Court is inclined to grant the compromise motion.

II. Application to Employ Auctioneer

11 U.S.C. § 327(a) states:

- (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 328(a) states, in pertinent part:

- (a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis.

The Court is satisfied that the evidence submitted in support of the application contains sufficient detail to establish the disinterestedness of the proposed auctioneers. The Court does note, however, that the application is lacking in evidence or information that would enable the Court to assess the reasonableness of the compensation arrangement. The Court notes that from its review of the application it

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appears to be anticipated that the auctioneer will not receive its full 25% commission due to the guaranteed threshold recovery, and that the auctioneer's expenses may also be reduced due to the cap on expenses.

III. The Sale Motion

11 U.S.C. § 363(b)(1) allows a trustee to sell property of the estate outside of the ordinary course, after notice and a hearing. A sale pursuant to § 363(b) requires a demonstration that the sale has a valid business justification. *In re 240 North Brand Partners, Ltd.*, 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996). "In approving any sale outside the ordinary course of business, the court must not only articulate a sufficient business reason for the sale, it must further find it is in the best interest of the estate, i.e. it is fair and reasonable, that it has been given adequate marketing, that it has been negotiated and proposed in good faith, that the purchaser is proceeding in good faith, and that it is an "arms-length" transaction." *In re Wilde Horse Enters., Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal.).

While the motion does not contain any detailed evidence of the advertising of the Property, the Court notes that the scheduled value of the Property and Trustee's assertion that a different auctioneer believed that the Property would sell for less than \$60,000, indicate that the auctioneer here is primarily shouldering the risk involved because the proceeds received by the bankruptcy estate are a fixed \$60,000 if the aggregate auction sale price is between \$60,000 and \$107,000.

Trustee requests that the sale be approved free and clear of liens. 11 U.S.C. § 363(f) (2010) states:

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if-

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

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- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Trustee identifies three potential lienholders with liens affecting the Property: (1) Weaver Popcorn Bulk, LLC ("Weaver"); (2) Claudia Armenta Santoya ("Santoya"); and (3) the EDD (eight different liens). Trustee relies upon 11 U.S.C. § 362(f)(4), arguing that all of the liens are in bona fide dispute.

Regarding the Weaver lien, Trustee asserts that "[t]he collateral description appears to include food products and not Equipment." Based upon the Court's review of the UCC financing statement submitted in support of the sale motion, it does appear Trustee is not proposing to sell any property that Weaver holds a lien against. Therefore, to the extent Weaver contends it holds a lien against the Property, the Court finds that such lien is in bona fide dispute pursuant to 11 U.S.C. § 362(f)(4).

Regarding the Santoya lien, Trustee asserts that the lien was released on August 18, 2020. Based upon the Court's review of the Judgment Lien Change Form submitted in support of the sale motion, it does appear that Santoya's lien has been released. Therefore, to the extent Santoya contends it holds a lien against the Property, the Court finds that such lien is in bona fide dispute pursuant to 11 U.S.C. § 362(f)(4).

Regarding the EDD liens, Trustee argues that each lien: (i) has been released; (ii) is avoidable under § 547; or (iii) is void under § 549. The recording of a post-petition tax lien is a violation of the automatic stay. *See, e.g., In re Pinkstaff*, 974 F.2d 113 (9th Cir. 1992). Liens recorded in violation of the automatic stay are void. *See, e.g., In re Schwartz*, 954 F.2d 569 (9th Cir. 1992) Therefore, the Court concludes that the five EDD liens recorded postpetition are in bona fide dispute under 11 U.S.C. § 362(f)(4). The Court also notes the EDD lien containing filing number 20197741846582 was

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released on February 19, 2020, due to the filing of a release of lien. Therefore, to the extent EDD contends this remains a lien against the Property, the Court finds that such lien is in bona fide dispute pursuant to 11 U.S.C. § 362(f)(4).

Regarding the EDD lien recorded during the 90-day preference period, Trustee contends that the lien is avoidable under § 11 U.S.C. § 547. Statutory liens are not avoidable under § 547. *See* 5 COLLIER'S ON BANKRUPTCY ¶ 547.08[6] (16th ed. 2017) ("Section 545 is the exclusive section for avoiding statutory liens."). Nevertheless, may be able to avoid the lien under 11 U.S.C. § 545. *See, e.g., In re Mainline Equip., Inc.*, 539 B.R. 165 (B.A.P. 9th Cir. 2015). Therefore, the Court finds this lien is in bona fide dispute pursuant to 11 U.S.C. § 362(f)(4).

Trustee has also requested waiver of the fourteen-day stay. FED. R. BANKR. P. Rule 6004(h) states: "An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." The Court deems the absence of objections to be consent to the relief requested, pursuant to Local Rule 9013-(1)(h), and, therefore, will waive the stay of Rule 6004(h).

TENTATIVE RULING

The Court is inclined to GRANT the compromise and sale motions in their entirety and APPROVE the application to employ auctioneer.

APPEARANCES REQUIRED.

Party Information

Debtor(s):

Fasttrak Foods, LLC

Pro Se

Movant(s):

Todd A. Frealy (TR)

Represented By
Carmela Pagay
Anthony A Friedman

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CONT... Fasttrak Foods, LLC

Chapter 7

Trustee(s):

Todd A. Frealy (TR)

Represented By
Carmela Pagay
Anthony A Friedman

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2:00 PM

6:17-20092 Mark Bastorous

Chapter 7

Adv#: 6:21-01073 Pringle v. Shenouda

#6.00 Status Conference RE: [1] Adversary case 6:21-ap-01073. Complaint by John P. Pringle against Christine S. Shenouda. (\$350.00 Fee Charge To Estate). Complaint: (1) For Authorization to Sell Real Property in Which Co-Owner Holds Interest Pursuant to 11 U.S.C §363(h); and (2) For Authorization to Pay Costs of Sale Pursuant to 11 U.S.C. §363(j) Nature of Suit: (31 (Approval of sale of property of estate and of a co-owner - 363(h)))

EH__

Docket 1

***** VACATED *** REASON: JUDGMENT ENTERED 8/25/21**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Mark Bastorous

Represented By
Thomas F Nowland

Defendant(s):

Christine S. Shenouda

Pro Se

Joint Debtor(s):

Bernadette Shenouda

Represented By
Thomas F Nowland

Plaintiff(s):

John P. Pringle

Represented By
David M Goodrich
Sonja Hourany

Trustee(s):

John P Pringle (TR)

Represented By

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CONT...

Mark Bastorous

David M Goodrich
Reem J Bello

Chapter 7

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6:18-16908 Visiting Nurse Association of the Inland Counties

Chapter 11

Adv#: 6:21-01035 Meislik v. Hutton Foundation, Inc

#7.00 CONT. Status Conference RE: [1] Adversary case 6:21-ap-01035. Complaint by Adam Meislik against Hutton Foundation, Inc. Recovery, and Preservation of Actual Fraudulent Transfer; and (2) Avoidance, Recovery, and Preservation of Constructively Fraudulent Transfer [11 U.S.C. Sections 544(b), 548, 550, and 551; Cal. Civ. Code Sections 3439.04, 3439.05], filed by Adam Meislik, solely in his capacity as the Liquidating Trustee for the Liquidating Trust of Visiting Nurse Association (Attachments: # 1 Adversary Proceeding Cover Sheet) Nature of Suit: (14 (Recovery of money/property - other)), (13 (Recovery of money/property - 548 fraudulent transfer)) (Wood, David)

From: 5/26/21, 7/7/21

EH__

Docket 1

***** VACATED *** REASON: CONTINUED TO 11/10/21 BY ORDER
ENTERED 8/25/21**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Visiting Nurse Association of the

Represented By
David M Goodrich
Beth Gaschen
Jennifer Vicente
Ryan W Beall
Steven T Gubner
Jason B Komorsky

Defendant(s):

Hutton Foundation, Inc

Represented By
William C Beall

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CONT... Visiting Nurse Association of the Inland Counties

Chapter 11

Plaintiff(s):

Adam Meislik

Represented By
Richard A Marshack
David Wood

**United States Bankruptcy Court
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Wednesday, September 8, 2021

Hearing Room 301

2:00 PM

6:21-10840 Bruce A. Parker

Chapter 7

Adv#: 6:21-01042 Red Rock Minerals LP et al v. Parker

#8.00 Order to Show Cause why case should not be dismissed

EH__

Docket 26

***** VACATED *** REASON: DISMISSED 9/1/21**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Bruce A. Parker

Represented By
Lazaro E Fernandez

Defendant(s):

Bruce A. Parker

Represented By
J. Luke Hendrix

Plaintiff(s):

Red Rock Minerals LP

Pro Se

Paul K Singh

Pro Se

Trustee(s):

Robert Whitmore (TR)

Pro Se

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6:21-11740 Yvonne Miranda

Chapter 7

Adv#: 6:21-01074 Fisher v. Miranda et al

#9.00 Status Conference RE: [1] Adversary case 6:21-ap-01074. Complaint by Mark Lee Fisher against Yvonne Miranda, Linda Juarez. false pretenses, false representation, actual fraud))

EH__

[Tele. appr. Todd Turoci, rep. Defendants]

Docket 1

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Yvonne Miranda

Represented By
Freddie V Vega

Defendant(s):

Yvonne Miranda

Represented By
Todd L Turoci

Linda Juarez

Represented By
Todd L Turoci

Joint Debtor(s):

Linda Juarez

Represented By
Freddie V Vega

Plaintiff(s):

Mark Lee Fisher

Represented By
Erik Hammett

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CONT... Yvonne Miranda

Chapter 7

Trustee(s):

Howard B Grobstein (TR)

Pro Se